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August 3, 1989

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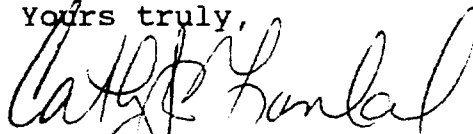
Ms. Donna Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: A.C. Nielsen Company Request for Permissive Authority
to Use Line "22" of the Television Video Signals

Dear Ms. Searcy:

On behalf of LBS Communications Inc., this is to request the Commission to withhold action on the above-referenced request until August 15, 1989 pending a review of the facts and circumstances surrounding the A.C. Nielsen Company's application, and with particular regard to whether or not the application presents the Commission with possible anti-competitive activity.

Yours truly,


Cathy J. Frankel
Counsel for LBS Communications Inc.

CJF:kpk

cc: Mr. Alex D. Felker, Chief, ✓
Mass Media Bureau (via Federal Express)
Mr. Roy J. Stewart, Chief,
Video Services Division (via Federal Express)

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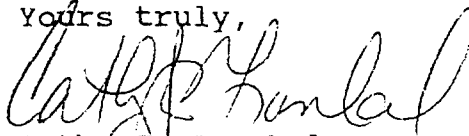
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JOHN G. JOHNSON, JR.

August 22, 1989

BY HAND DELIVERY

Bradley P. Holmes, Esquire
Chief
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2025 M Street, Northwest
Room 8010
Washington, D. C. 20036

In re: Request of A. C. Nielsen Company for Permissive
Authority to Use Line 22 of Active Television
Video Signal to Broadcast Encoded Transmission
Identification and Verification Signals;
Notice of Violation of *Ex Parte* Rules and
Request for Remedial Measures and Sanctions.

Dear Mr. Holmes:

This law firm represents Airtrax, a general
partnership organized under the laws of the State of California
("Airtrax").

As the Commission's staff is aware, by letter of its
communications counsel dated July 19, 1989, A. C. Nielsen
Company ("Nielsen") submitted to the Commission a request (the
"Request") for permissive authority to use Line 22 of the
active portion of the television video signal in order to
broadcast encoded transmission identification and verification
signals pursuant to Nielsen's Automated Measurement of Lineups
("AMOL") system.

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August 22, 1989
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On August 8, 1989, we submitted to the Commission, on behalf of Airtrax, a formal Opposition to the Request (the "Opposition"), wherein were set forth several grounds for denial of Nielsen's Request based upon established Commission law and policy.

It has come to our attention that subsequent to our filing of the August 8 Opposition, Nielsen has made several submissions to the Commission's staff in direct support of the Request, copies of which were not served upon Airtrax's undersigned counsel of record, notwithstanding Airtrax's obvious status as an interested party to the Request.

Airtrax's Opposition asks the Commission formally to designate the proceeding generated by Nielsen's Request and by Airtrax's Opposition thereto as a "restricted proceeding," pursuant to Section 1.1208(c)(5) of the Commission's Rules and Regulations, 47 C.F.R. Section 1.1208(c)(5) (1988), and to apply the Commission's *ex parte* rules accordingly. Opposition, at page 21.

To the best of our knowledge, the Commission has not yet acted upon Airtrax's request in that regard.

Nielsen's conduct in choosing not to serve copies of its presentations to the Commission's staff upon Airtrax's counsel of record betrays an apparent misapprehension on Nielsen's part, to the effect that in the absence of a formal designation of this proceeding as "restricted" pursuant to Section 1.1208(c)(5), the Commission's *ex parte* rules have no applicability herein.

Nielsen is gravely mistaken, and its repeated presentations to the Commission's staff, without effecting service of copies thereof upon Airtrax's counsel, have been in flagrant violation of the Commission's *ex parte* rules. Remedial measures and sanctions are therefore necessitated. Airtrax's analysis follows.

LEGAL ANALYSIS

Section 1.1208(a) of the Commission's Rules and Regulations, 47 C.F.R. Section 1.1208(a) (1988), flatly prohibits the making of *ex parte* presentations in "restricted proceedings."

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Section 1.1208(c)(1)(ii)(A) of the Commission's Rules and Regulations, 47 C.F.R. Section 1.1208(c)(1)(ii)(A) (1988), provides, in pertinent part, that the term "restricted proceedings" includes "[a]ny adjudicative proceeding, including . . . [various proceedings conducted pursuant to specific provisions of the Communications Act of 1934, as amended, none of which are germane here]" (emphasis added).

Section 1.1202(d) of the Commission's Rules and Regulations, 47 C.F.R. Section 1.1202(d) (1988), defines an "adjudicative proceeding" as

[a]ny proceeding, other than a rule making or a tariff proceeding involving future rates or practices, initiated upon the Commission's own motion or upon the filing of an application, a petition for special relief or waiver, or a complaint or similar pleading that involves the determination of rights and responsibilities of specific parties..

Nielsen's Request clearly is a "petition for special relief" that "involves the determination of rights and responsibilities of specific parties," inasmuch as Nielsen's Request seeks special permission from the Commission to enable Nielsen to provide a service which it cannot provide in the absence of such permission.

Section 1.1208(c)(1)(i)(B) of the Commission's Rules and Regulations, 47 C.F.R. Section 1.1208(c)(1)(i)(B) (1988), provides that a proceeding falling within the ambit of Section 1.1208(c)(1)(ii) of the Commission's Rules and Regulations, 47 C.F.R. Section 1.1208(c)(1)(ii) (1988), such as the adjudicative proceeding initiated by Nielsen's Request (*see supra*), becomes a "restricted proceeding" from the date upon which a "formal opposition or formal complaint" is filed.

Section 1.1202(e) of the Commission's Rules and Regulations, 47 C.F.R. Section 1.1202(e) (1988), defines a "formal opposition or formal complaint," as

(1) A pleading opposing the grant of a particular application, waiver request, petition for special relief or other request for Commission action, . . . which meets the following requirements:

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(i) The caption and text of a pleading make it unmistakably clear that the pleading is intended to be a formal opposition or formal complaint;

(ii) The pleading is served upon the other parties to the proceeding or, in the case of a complaint, upon the person subject to the complaint; and

(iii) The pleading is filed within the time period, if any, prescribed for such a pleading.

Airtrax's August 8 Opposition clearly qualifies as a "formal opposition or formal complaint" under the above-quoted definition.

In the first place, the Opposition was submitted in formal pleading style and format, with a caption and text that make it unmistakably clear that the Opposition is intended to be a formal opposition. Nielsen has effectively conceded as much, by filing with the Commission on August 21, 1989 a formal pleading entitled, "Reply to Opposition to Request," with service of a copy thereof upon Airtrax's undersigned counsel of record.

Secondly, a copy of Airtrax's Opposition was served upon Nielsen at the time of the filing of same, Nielsen then being the only other party to the proceeding known to Airtrax at the time of such filing.

Thirdly and finally, Airtrax's Opposition was filed with the Commission in a timely fashion, prior to any action by the Commission's staff upon Nielsen's Request (there being no "prescribed" time period for the filing of the Opposition established in the Commission's Rules and Regulations).*/

*/ By letters to the Commission's staff from Airtrax's counsel dated July 28, 1989 and August 7, 1989, Airtrax had alerted all parties that the Opposition would be filed on August 8, 1989.

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Under the foregoing circumstances, Airtrax submits respectfully that the Commission's *ex parte* rules are clear beyond peradventure that even in the absence of a Section 1.1208(c)(5) formal designation by the Commission of this proceeding as a "restricted proceeding," from and after the filing on August 8, 1989 of Airtrax's Opposition, this proceeding has qualified as a "restricted proceeding" under the authority of the above-cited Commission Rules and Regulations.

FACTUAL ANALYSIS

Despite the preceding, and notwithstanding Nielsen's apparent concession of Airtrax's entitlement to receive copies of Nielsen's written presentations to the Commission's staff in support of the Request, as manifested by Nielsen's service of its August 21, 1989 "Reply to Opposition to Request" upon Airtrax's counsel, Nielsen submitted at least two (2) letters to the Commission's staff, dated August 11, 1989 and August 14, 1989, respectively, that directly address the merits of Nielsen's Request, yet Nielsen did not serve copies of same upon Airtrax's counsel, as required by Section 1.1202(b)(1) of the Commission's Rules and Regulations, 47 C.F.R. Section 1.1202(b)(1) (1988).

In addition, Nielsen has apparently supplied the Commission's staff with a VHS-formatted videotape of a television program whose Line 22 is allegedly encoded with Nielsen's AMOL signals, without having served a copy of same upon Airtrax's counsel. See letter from Grier C. Raclin, Esquire, to Bradley P. Holmes, Esquire, dated August 11, 1989, at pages 4-5, footnote 10.

Furthermore, in view of Nielsen's patent disregard of the Commission's *ex parte* rules, Nielsen or its representatives may have made prohibited oral *ex parte* presentations to the Commission or to its staff in support of the Request, without having given Airtrax appropriate advance notice of same and an opportunity to be present thereat, as required by Section 1.1202(b)(2) of the Commission's Rules and Regulations, 47 C.F.R. Section 1.1202(b)(2) (1988).

Nielsen cannot claim ignorance of Airtrax's status as an interested party, given the fact that in both the August 11 and August 14 letters, Nielsen acknowledged the prior filing of Airtrax's Opposition. See letter from Mr. Raclin to Mr. Holmes, dated August 11, 1989, at page 1, footnote 1; letter from Mr. Raclin to Mr. Alex D. Felker, dated August 14, 1989, at page 1, footnote 2.

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Nor can Nielsen claim ignorance of the Commission's *ex parte* rules, since Nielsen is represented by competent and experienced communications counsel.

The multiple violations by Nielsen of the Commission's *ex parte* rules were conscious, elective, and intentional. No excuse for such violations presents itself. The Commission is entreated to protect the integrity of its decision making process by redressing Nielsen's attempt to subvert procedures that have been promulgated in order to ensure fairness, due process, and the appearance of same.

REQUEST FOR REMEDIAL MEASURES AND SANCTIONS

Airtrax respectfully submits that Nielsen's conduct in this proceeding has exhibited wanton disregard for both the letter and the spirit of the Commission's *ex parte* rules.

Airtrax requests that with respect to all written and videotaped presentations and with respect to any oral presentations heretofore made by Nielsen or by any of its representatives to the Commission or to its staff, the Commission should promptly invoke the remedial procedures set forth in Section 1.1212 of the Commission's Rules and Regulations, 47 C.F.R. Section 1.1212 (1988).

Additionally, for both prophylactic and punitive purposes, the Commission should impose upon Nielsen appropriate sanctions for its willful and repeated attempts to undermine the procedural safeguards embodied in the Commission's *ex parte* rules, up to and including the sanction of requiring Nielsen "to show cause why . . . [its] claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected." See Section 1.1216(a)(2) of the Commission's Rules and Regulations, 47 C.F.R. Section 1.1216(a)(2) (1988).

Lastly, the Commission's staff should promptly undertake whatever action is deemed to be appropriate, including the formal designation of this proceeding as a "restricted proceeding" pursuant to Section 1.1208(c)(5), in order to ensure that violations of the *ex parte* rules by Nielsen and/or by its representatives will not recur.

Very truly yours,



John G. Johnson, Jr.

Bradley P. Holmes, Esquire
August 22, 1989
Page 7

cc: Mr. James McNally (by hand)
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Counsel to A. C. Nielsen Company

0582J